IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 10TH JANUARY 2007 / 20TH POUSHA 1928

WP(C).No. 997 of 2007(R)

OS.94/2006 of SUB COURT, MANJERI

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PETITIONER:

CHUNGATHARA GRAMA PANCHAYAT
REPRESENTED BY ITS SECRETARY,
CHUNGATHARA AMSOM, MALAPPURAM DISTRICT

BY ADV. SRI.K.M.SATHYANATHA MENON

RESPONDENTS:

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1. GOODSHEPPERED EDUCATION AND CHARITABLE TRUST, REPRESENTED BY MANAGING TRUSTEE GEORGE PHILIP, CHUNGATHARA AMSOM, MALAPPURAM DISTRICT

2. T.V.VARGHESE, S/O.VARGHESE, THAIVACHATHIL HOUSE, P.O. CHUNGATHARA, PALUNDA, MALAPPURAM DISTRICT

3. SALEEM, VALIYATHODIKA HOUSE, P.O. CHUNGATHARA, MALAPPURAM DISTRICT

4. M.T.JOHN, S/O. ULAHANNAN, MARANGATTIL HOUSE, P.O. CHUNGATHARA, PALUNDA, MALAPPURAM DISTRICT

BY //

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 10/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NO.997 OF 2007

Dated 10th January 2007

J U D G M E N T

Petitioner was first defendant in O.S.94/06 on the file of Sub court, Manjeri. Respondent is the plaintiff. When the suit was pending, first respondent filed W.P.(C) No.19220/05 before this court, challenging the right of first respondent to take action under Section 169 of Panchayat Raj Act claiming that the disputed pathway is private property of first respondent. When the learned counsel appearing for Panchayat in the writ petition brought to the notice of this court that first respondent has already moved the trial court by filing O.S.94/06 it was represented that suit against petitioner panchayat will be withdrawn. When learned counsel appearing for petitioner herein pointed out that petition to withdraw was filed with liberty to implead petitioner at a later stage and attempt of first respondent in W.P.C.19220/05 was to have a decision on the question whether property is the

private property of first respondent or a public road wherein panchayat has got a right in the writ petition this court as per judgment dated 10/10/2006 held that the disputed question of fact cannot be decided in the writ petition and that question is to be decided in that suit. By that time under Ext.P1 order, trial court has already allowed first respondent to withdraw the suit, as against petitioner, though permission was not granted to implead petitioner at a later stage. After the disposal of writ petition finding that this court did not decide the question whether the pathway is public or private raised by first respondent in the writ petition, first respondent filed I.A.1814/06 to implead petitioner as 5th defendant. Under Ext.P2 order learned Sub Judge allowed that application. It is challenged in this petition filed under Article 227 of Constitution of India.

2. Argument of learned counsel appearing of petitioner was that in I.A.949/2006 plaintiff sought liberty to withdraw the suit as against petitioner who was then first defendant to implead the panchayat as a defendant at later stage and that was disallowed under Ext.P1 order and therefore learned Sub Judge is not competent to allow first respondent to be impleaded at

a later stage when the prayer was earlier rejected under Ext.P1. Learned counsel also pointed out that after the appearance of petitioner, in answer to the summons received from the court, as per Ext.P2 order learned Sub Judge did not grant sufficient opportunity to the petitioner to file written statement and therefore Ext.P2 order is to be quashed.

3. Under Ext.P1 order though first respondent sought permission to withdraw suit as against petitioner with liberty to implead the panchayat at a later stage, it was disallowed. But the question is whether that order would operate as res judicata to permit first respondent to implead petitioner as an additional defendant at a later stage. If after consideration learned Sub Judge found that petitioner is not entitled to withdraw the suit and thereafter permitted to implead the same petitioner as defendant the argument of learned counsel appearing for petitioner could have been accepted. Ext.P1 Order disallowing first respondent to withdraw the suit with liberty to implead petitioner once again, show that learned Sub Judge did not consider that question at all. The relevant portion of the order reads

"condition to allow the petitioner to implead first respondent again subject to the judgment to be passed in the writ petition cannot be considered at this stage." Therefore Ext.P1 order will not operate res judicata as that question was not considered on merit. Ext.P2 order cannot be challenged on that ground. More over, this court as per judgment in W.P.C.19220/05 directed that the question, whether disputed property is a private property of first respondent or public pathway belonging to the panchayat, is to be decided in the suit. In such circumstances, petitioner panchayat is a necessary party in the suit. There is no infirmity in the order or reason to interfere with Ext.P2 order. As petitioner was subsequently impleaded, learned Sub Judge has to grant sufficient opportunity to file written statement to petitioner to raise necessary contention in the suit and proceed with trial only thereafter.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.